Supreme Court of the United States

OCTOBER TERM, 1902.

No. 257.

THE DEFIANCE WATER COMPANY, APPELLANT,

v.

THE CITY OF DEFIANCE AND THE COUNCIL OF THE CITY OF DEFIANCE, APPELLEES.

APPELLEES' SUPPLEMENTAL BRIEF.

As our original brief was printed before we had opportunity to inspect appellant's brief, we submit this supplemental brief.

We suggest that the court examine the pleadings, both in the Federal and in the State courts, as there is room for difference of opinion as to the issues raised, especially as to what appellees "admit in substance," which phrase is so frequently used in the statement by appellant.

Bill, p. 1, Rec.; amendment, p. 25, Rec.; sup. bill., p. 33, Rec.; answer, p. 56, Rec.; reply, p. 80, Rec.; amend-

ment to prayer, p. 86, Rec.; plea, p. 89, Rec.; decree, p. 98, Rec.; assignments of error, p. 100 Rec.

Petition in State court, p. 148, Rec.; answer, p. 166, Rec.; reply, p. 175, Rec.; decree, p. 192, Rec.

First. The objection (p. 11, Appellant's Brief) that the plea of *res adjudicata* should have been named *supplemental answer* or *cross-bill* we think of little importance. The complainant, when the plea was presented as a supplemental answer, insisted vehemently that it should be called a plea and must be so presented and named, and the court considered this argument very persuasive and ordered that the name of the paper should be changed; but now the contention is made that the original name should have been retained. We find that such a pleading has been called by the various names "Cross-bill," "Supplemental answer," and "Plea," but the trial court preferred to follow the judgment of this court as announced by Mr. Justice Davis in Cajole *v.* Curtis, 80 U. S., 465, *473*, and the practice of the circuit court of the sixth circuit.

Second. The claim made by appellant in its brief (p. 12) that the same question had been passed on by the court, we think is erroneous. The defendants below asked the circuit court to stay proceedings until the case in the State court could be finally adjudicated, and this was overruled (Rec., p. 80 to 85). After new members came into the city council application was made to Judge Wanty that the appearance of such new members be entered, and he concluded that was unnecessary, and the opinion on that application is that referred to by Judge Wing at page 88 of the record. The

request to stay proceedings because of the former pendency of another suit is an entirely different question from the aplication for leave to plead a judgment in another suit between the same parties.

Third. (1) It is claimed the parties are not the same (p. 13). That in the suit by the city against the Council and the Water Company, the Water Company is merely a nominal party.

In suits in equity those persons are proper parties whose rights or interests are affected and those are necessary parties who are entitled to contest plaintiff's right to the relief sought, or without whose presence and opportunity to be heard full equity cannot be done.

Con. Water Co. *v.* San Diego, 35 C. C. A., 681, and cases.
McArthur *v.* Scott, 113 U. S., 340; B. 28, p. 1015.
Penn. *v.* Hayward *et al.*, 14 O. S., 302, 306.
Sec. 5006, Rev. St. Ohio.
N. Or. Water W. Co. *v.* N. O., 164 U. S., 471.
State Cal. *v.* So. Pac. Co., 157 U. S., 249.
See p. 5 *et seq.*, Appellee's Brief.
Gas Light Co. *v.* Zanesville, 47 O. S., 35, *49*.

(2) The claim that the *subject-matter* of the two suits is not the same is likewise without merit (p. 13). In the State courts the suit was by the city against the Water Company to declare there was nothing due or payable to the Water Company under the contract, because the contract was illegal and void and prohibited by law for the reasons stated. In the Federal court the suit was by the Water Company against the city to have the contract declared valid, the city enjoined

from disputing its validity and compelled to pay the amount claimed to be due under the contract. The fact that one party claimed there was nothing due, which the other party disputed, in one case, and in the other case the last party claimed a certain amount and the first party claimed there was nothing due, does not make a different question or a different issue. The question is, after all, whether the contract is valid and anything is payable under it, and that was the question decided in the State court, and that is the question sought to be decided in the Federal court. (See pp. 35 and 36 and pp. 4 to 12, Defendants' Brief.)

But appellant contends (p. 14) that the circuit court of the State had no jurisdiction of any claim by the Water Company. The city stated that there was an alleged or pretended contract running for thirty years on which the Water Company was claiming and the council threatening to pay upwards of three thousand dollars every six months, and that no payments could ever be legally made under the contract because it was void and prohibited for certain reasons stated. This the Water Company denied and set up certain grounds of estoppel, and under this the court, on the issues, had jurisdiction to determine the validity of the contract and whether anything was due or payable under it. If a suit should be brought to set aside a note for illegality or fraud in obtaining it and it was adjudged void and canceled, it could hardly be claimed that because the defendant did not by counterclaim ask judgment for the amount he claimed due him on the note he could afterward sue on the note and obtain judgment. That is substantially the position of appellant here. The statutes of Ohio authorize any court, common pleas or circuit, to grant leave to answer or amend upon ruling on a

demurrer (sec. 5113), and the statute provides that the answer may contain denials and affirmative matter, counter-claims, or set-offs, such as heretofore have been considered either legal or eqaitable defenses (sec. 5070); so that the contention that the circuit court had no jurisdiction except upon the pleadings made below is not well taken.

(3) The contention (p. 15) that the capacity in which the parties sue is different we believe is not well grounded. (See p. 37 *et seq.*, Defendants' Brief, especially middle of page 39.)

The claim that as the city solicitor's suit is for the taxpayers therefore it is not a suit by the city is not well founded. The question has been decided by this court in *Scotland County v. Hill*, 112 U. S., 183, *186*, and in Ohio in Zanesville Gas Case, 47 O. S., *49;* Ransom *v.* City Pierre, 41 C. C. A., 585, *588*, and cases.

The City of Defiance and the Water Company are adversary parties in both suits. That the third party, The City Council, was adversary to the city in one suit and codefendant with the city in the other is immaterial. In truth and in fact, by its allegations of fraud and conspiracy in bringing the suit, the Water Company made both the city and the City Council adversary parties to it.

Fourth. Counsel, with all their diligence, find one case that holds that a ruling on a demurrer prevents a re-examination in the same court of the law and facts of the case when pleadings are amended or answer filed (p. 17). The affirmance of that case by this court did not involve a determination of this question. (See p. 41 *et seq.* of defendants'

brief.) Counsel, it seems to us, confuse precedent and *res adjudicata*. The binding effect of former adjudications is waived if not pleaded. The persuasive influence of a precedent exactly in point abides, though not pleaded. The first is conclusive on all the courts within the United States. The second is conclusive only on inferior courts within the same jurisdiction. The distinction between precedent and *res adjudicata* is shown in Fuller *v.* Hamilton, 53 Fed. Rep., 411, and Billings *v.* Gilmore, 60 Fed., 332; 8 C. C. A., 645.

Fifth. It is said (p. 20) that the judgment of the State court is of no effect because proceedings IN ERROR for its reversal were pending in the supreme court of Ohio. (*a.*) No objection or assignment of error on this ground was made. (*b.*) It does not appear that it was disclosed to the court below that proceedings in error were pending (Sherman *v.* Dilley, 3 Nev., 21, 27). The only reference in the record to the supreme court of Ohio is found on page 204 at the conclusion of transcript of docket and journal entries of the circuit court, which, in the printed record, commence near the bottom of page 196, and is in these words:

"Filed May 25th, 1901, in supreme court of Ohio. J. B. Allen, clerk."

And the same file-mark on the transcript of Trial Docket Entries, p. 211.

The proceedings to obtain a reversal of a judgment by the supreme court of Ohio must be by petition in error filed in the supreme court, on which a summons must be issued by the clerk and served on the defendants to the error proceeding, or publication made as in the commencement of an

action; and a proceeding in error is, by statute and the decisions of the court, deemed commenced at the date of the summons in error which is served.

Sec. 5035, Rev. St. Ohio.
Sec. 4987, Rev. St. Ohio.
Robinson *v.* Orr, 16 O. S., 284.
Buckingham *v.* Commer. Bank, 21 O. S., 131.
Bowen *v.* Bowen, 36 O. S., 312.
Sidener *v.* Hawes, 37 O. S., 544.

So that there is no showing whatever in the record that a proceeding in error had been commenced at the time of the trial in the lower court.

In Ohio even enforcement of a judgment or decree can only be suspended by supersedeas bond. There is no showing bond was given.

(*a.*) It is contended (p. 20) that a proceeding in error suspends the effect of a judgment in Ohio so that it cannot be used as the basis of a plea of *res adjudicata.* The citations from text books do not sustain this contention. The California cases are based upon peculiar statutory provisions, particularly section 1049 of the California Code. By statutes of Missouri and Tennessee the appeal, when perfected, vacates the judgment, and the cases cited are under those particular statutes.

But these decisions are contrary to the almost universal rule in the State courts and the rule of the Federal courts. (See pp. 27 to 30, inclusive, Appellees' Brief.)

Sixth. It is contended (p. 21) that the suit in the State court was brought by collusion between the city solicitor

and the council, and therefore the judgment is not *res adjudicata*. The record shows that the petition of the city was filed January 4, 1898 (Rec., p. 148); that in its petition for removal of the cause to the circuit court of the United States on January 19, 1898, the Defiance Water Company made the charge that the city and its council conspired and colluded together to bring the suit (Rec., p. 153); that the same contention was made in the answer of the Defiance Water Company, filed in the State court on the 10th of February, 1900 (Rec., pp. 173, 174); that the defendant Water Company, on the trial in the State court, had an opportunity to sustain its contention, and tendered the evidence it had on that subject, which it has not deemed of sufficient importance to print for the use of this court, and the contention of fraud and conspiracy was by the State court decided adversely to the Water Company with the other affirmative issues tendered by it in its answer.

The claim is not made that there was any fraud or imposition practiced in inducing the State court to take jurisdiction, or that the defendant was by fraud prevented from making defense, or the like, which are the only grounds of fraud on which, in any court, the binding force and effect of a judgment can be questioned in a court of co-ordinate jurisdiction.

But neither in this court nor in the Ohio courts can such a charge be used to prevent the binding force of a judgment between parties. (See p. 39 *et seq.*, Appellee's Brief.)

II.

ERROR AT THE HEARING.

First. The claim (p. 21) that the record offered by defendants below should not have been received is not well taken, for the reasons assigned at page 15 *et seq.*, defendant's brief.

The cases cited at top of page 22 in support of this claim by appellant do not sustain the doctrine that a transcript of a record is not admissible unless it is a transcript of the complete record.

There was no error in rejecting the transcript of the record filed and proceedings of said case offered by complainants for the reasons set forth at page 25 *et seq.*, Appellee's Brief.

Second. The claim (p. 22) that the evidence offered by defendant would have proved the judgment a nullity is discussed at pages 21 to 26, inclusive. The transcript at page 22, Schmalt's deposition at page 25, adjournment of court, pages 25 and 26, Appellee's Brief.

But the facts do not, as appellant contends, show a judgment was not rendered during term, but, on the contrary, appellant has printed in the record at page 211 a certified copy of the trial docket of the State court showing the submission of this case March 14, 1901, and the judgment of the court March 15, including a minute of all the orders then made over the signature of the presiding judge of the court, who announced the opinion and judgment of the court orally on the 15th of March, before adjournment of court (Appellee's Brief, pp. 22 to 27).

III.

The contention (p. 25) is made that the court erred in refusing to hear the case upon the *general issues* as well as upon the issues on the plea and answer thereto.

It is claimed that the plea failed to meet nearly all the material issues of the bill.

Nowhere in the brief of appellant, in the assignments of error, or in the record does the appellant disclose either to this court or did it disclose to the court below what claims of the bill were not met (7th Assmt., p. 102, Rec.; Objection, Rec., p. 99; Brief, bottom p. 25).

Under this contention two propositions are submitted.

The first (page 26) is that the case in the State court did not cover the plea of estoppel, which appellant says was the principal theory of the bill.

The second proposition (page 34) is that the statutes of Ohio under which the suit was brought did not authorize a suit in the State courts against the appellant.

As to the first proposition, the Defiance Water Company, in its answer in the State court (Rec., p. 166), makes numerous denials.

For its second defense the Water Company, at the middle of page 166, commences the plea of estoppel and says that "the plaintiff ought not to maintain its suit against this defendant, because," etc.; and in that answer of estoppel, which covers seven and one-half pages of the printed record and concludes, at the bottom of page 173, with the allegations that "the said city is now estopped from denying the validity of the contract and from refusing to pay the consideration price named therein," and in said answer there is set up

every allegation and statement in letter or in substance the same as in the bill, amendments, and supplements thereto, except the statements of the particular amount of the bonds taken and held by Boody, McClellan & Company, Dennis, Long & Company, and N. C. Sprague, in the place whereof is the general statement that all the bonds were taken by the said parties in interest. An issue was tendered to these allegations by the reply, and was submitted to the State circuit court on the evidence, and judgment was rendered against the Water Company.

Appellant in its brief in this court (pp. 26 to 34) argues the question of the sufficiency of this defense. We take it that it is immaterial and not proper matter of argument here. It is not whether the bill, under its theory and charge of an estoppel, or the answer, under its theory and charge of estoppel against the city, presented a good cause of action or defense or what the law on the subject of estoppel as it relates to municipal corporations is; but was this question of estoppel decided by the State circuit court. Very persuasive that the same question was submitted to the State circuit court is the fact that the argument which is presented to this court is an exact transcript of the argument presented on the same behalf in the State court on the suit pending there.

In the State court the city avers the contract is illegal and prohibited for certain reasons which it sets forth, and prays that the payment of any amount under the contract during the period for which it purports to run may be enjoined. The Water Company answered, denying the allegations of the petition, setting up the facts which it claims constitute an estoppel as a second defense. As a third defense pleaded the pendency of the suit in the United States court, and that

the suit in the State court was brought by fraud and collusion between the city solicitor and the council. These affirmative matters were denied and a judgment rendered declaring the contract void and enjoining the payment of anything under it. In the Federal court the Water Company brought a suit to have the contract declared valid, charging that the city had by ordinance or resolution impaired its validity and averring that the city claimed the contract was illegal and void, but averring that, if it were in its inception illegal, it had been made by the council and the Water Company's assignors, and that by reason of the same facts set up in the State court the city was estopped to dispute its validity or to prove facts which showed it was invalid, and further asked the court to take an account of the amount due it and order that it be paid by the city.

The only difference is that in the State court the city asserted that there was nothing due, and the Water Company denied this and asserted that the city should be estopped from disputing that the whole amount appearing on the face of the contract to be payable thereon was or would thereafter become due, while in the Federal court the Water Company by its amendment avers that there will be $3,142.50 due at the end of each six months during the period the contract has to run, and asks the court to take an account of the amount due and order it paid. If the claim that there is nothing due on a certain contract, and a judgment is entered that there is nothing due, meets and disposes of the claim that there is 30,000 or more dollars due on the same contract, then the plea meets all the issues of the bill.

The issues in both cases are:

1st. Was there a valid contract between the parties?

2d. If there were not a valid contract in its inception was the city estopped by the acts of its officers or its own acts from disputing the validity of the contract; and

3d. If the contract was valid or dispute of its validity estopped is there anything due on the contract?

Under the principle that the greater includes the less, a judgment that there is nothing now or hereafter payable on the contract includes a decision that the large amount claimed is not payable on the contract.

After all, we believe the best test for determining whether these matters were litigated would be the effect of diverse judgments in the two cases. The city in the first suit is prevented from paying the Water Company. Suppose in the second suit the city were ordered to pay the Water Company, these judgments bring about a conflict of Federal and State authority. One of the beneficial objects of the doctrine of *res adjudicata* is that unseemly conflicts between courts of concurrent jurisdiction shall be avoided. Certainly, a good test is whether it brings about the desired result.

Second. The second contention (p. 34) of complainant is that the case should have been heard upon all the issues, because the statutes of Ohio did not authorize the suit in the State court against this appellant.

(*a.*) No objection was made in the Federal circuit court that the State court did not have jurisdiction of the subject-matter or the person of the Water Company (Rec., p. 98).

No such assignment of error is made in this court (Rec., p. 100).

(*b.*) The appellant pleaded the judgment of the State common pleas court, sustaining its demurrer and dismissing plaintiff's petition in that court, as an adjudication in its favor, by supplement to its bill, and is estopped in this case to dispute the jurisdiction of said State court (Rec., p. 33).

(*c.*) The statute is not subject to such narrow construction. In Cincinnati Street Railway Co. *v.* Smith, Judge Gilmore of the supreme court of Ohio, in announcing the opinion of the court, ofter quoting sections 1777 and 1778, says:

"The sections do not provide remedies that were previously unknown. Courts of equity had long taken jurisdiction and granted injunction in such cases when properly presented by interested individuals, whose rights were in jeopardy, by the illegal or unauthorized acts, or threatened acts, of municipal corporations. The sections were therefore simply intended to regulate the practice in such cases to this extent, that applications for injunctions in such cases should be made by the city solicitor, and should not be made without his knowledge."

Cin. St. Ry. Co. *v.* Smith, 29 O. S., 303.
Gas Light Co. *v.* Zanesville, 47 O. S., 35, *49*.

So that appellant's contention that the statute of Ohio authorizing this suit limits the parties against whom this may be brought to the city council is not the view of the supreme court of Ohio, but the ordinary rules of courts of equity govern the suit as they did before, and the sections referred to were "*simply intended to regulate the practice in such cases to this extent that applications for injunctions in such cases*

should be made by the city solicitor and should not be made without his knowledge." The same parties who would be proper or necessary parties to an ordinary bill in equity are proper and necessary parties to a suit of this nature, according to the rule of the supreme court of Ohio construing this statute. This question is discussed at page 2 above.

Neither is it true that this statute applies only to contracts not executed. No less than fourteen times has the supreme court of Ohio held that payments cannot be made by counties, townships, school districts, or municipalities under illegal contracts under statutes prohibiting such contracts, on suit brought by the attorney general, prosecuting attorney, city solicitor, or taxpayer.

Under this statute and like statutes city councils, county commissioners, school district and township trustees have been prohibited from paying for sewers, bridges, halls, fire department supplies, attorneys' fees, superintendent's services, and nearly every conceivable kind of material and services.

City Lancaster *v.* Miller, 58 O. S., 558, sewer contract.
City Findlay *v.* Pendleton, 62 O. S., 80, attorney fees.
State *v.* Hoffman, 25 O. S., 328, Sup. St. imp.
Doit *v.* Village Riverside, 4 C. C., 312, sup. con. hall.
Comstock *v.* Nelsonville, 61 O. S., 288.
Niles W. Co. *v.* Niles, 59 Mich., 311.
S. C., 26 N. W., 525.
Com'rs *et al. v.* State *ex rel.*, 66 O. S., 654.
Findlay *v.* Pendleton, 62 O. S., 80.
Buchanan Bridge Co. *v.* Campbell, 60 O. S., 406.
At. City W. W. *v.* Read, 15 Atl., 10.
City Wellston *v.* Morgan, 59 O. S., 148.
Cases cited pp. 46, 47, Appellee's Brief.

We do not understand that State *v.* Com'rs, 56 O. S., 718, is authority for the proposition quoted. It holds that the taxes levied for improving, grading, and macadamizing a certain road, which had been voluntarily paid, could be used for that purpose, although the taxes had been levied under an unconstitutional act, and that it would not be a misappropriation of the money paid on these taxes now in the treasury to the credit of this fund to use them for the purpose for which they were voluntarily paid. The funds there in issue had been voluntarily paid for the express purpose of grading and macadamizing a certain avenue; and the court held they could be used for that purpose. The taxes in question were levied under the general law of Ohio for furnishing the city with water, not for paying the Defiance Water Company's bills for water. This contention goes to the correctness of the adjudication of the State court, not to the question of the fact of former adjudication, which is the only issue here.

IV.

We cannot agree with complainant in its claim (p. 35) that the Water Company is entitled to a final decree without trial on the merits, even if the court should hold that the plea of *res adjudicata* is not well taken. There are numerous reasons why this is so. The city's answer denies that any ordinance or resolution impairing the contract between the Water Company and the City was ever passed, and if any were ever passed that it was ever published, and aver that under the law of Ohio it did not become a law or have any force and effect without such publication, and hence could be no

impairment. Besides this, substantially every material allegation of complainant's bill in the Federal circuit court on which its right of action depends is denied by the answer of the city, and the failure of the Water Company to perform its contract, if it had one, is set up at large, and hundreds of pages of testimony which are not before this court have been taken sustaining, as we think, every averment of the answer and disproving every claim of the bill. And on these issues and the proof the case should be heard if the adjudication pleaded is not final, and if the court, under the answer, has jurisdiction of the subject-matter. This, in conclusion, brings us to this suggestion, to wit:

The complainant, the Water Company, a citizen of Ohio, brings its suit against the City of Defiance and its council, all citizens of Ohio, in the Federal court, on a contract which it seeks to enjoin the city from disputing, and alleging, as ground of Federal jurisdiction, that two years before the bringing of the suit the city council of the city of Defiance had passed an ordinance or resolution denying that the Water Company had a valid contract and resolving that it would not pay anything thereafter on that contract, and further alleging that for two years thereafter, four times, the city did pay the semi-annual installments claimed to be due under that contract, but that by said resolution or ordinance the obligations of the contract between the City and the Water Company were impaired. By its answer the city disputes that any such ordinance or resolution was ever passed or that it or any ordinance or resolution of said council impaired or was intended to impair the obligations of the said contract; that in truth and in fact there was no contract,

and that the city and its officers disclaimed any reliance on or use of said so-called impairment ordinance or resolution or that it ever has relied or now relies on the same or any ordinance or resolution for any right, defense, or benefit in the contest and dispute between the said City and the Water Company further than that the alleged ordinance or resolution of January 7, 1896, was a resolution notifying said Water Company that it had failed and was failing to comply with the terms of the contract which it claimed to be existing between it and the City of Defiance. Further than this, the city averred that the said resolution, if one ever existed, had been repealed by the said council long prior to the commencement of the said action by the said Water Company.

We contend that when this answer came in disclaiming reliance on the said so-called impairment ordinance or resolution of January 7, 1896, or any other ordinance or resolution, either as the basis of a cause of action or ground of defense in any manner or form in said suit, and that said resolution, whatever it was, had been repealed, all ground of Federal jurisdiction, disappeared and that the court should forthwith have dismissed the action.

FRED L. HAY, *City Solicitor*,
HENRY B. HARRIS AND
JOHN P. CAMERON,
Solicitors for the Council of the City of Defiance.

(18,426)

Supreme Court of the United States

OCTOBER TERM, 1903

No. 21

THE DEFIANCE WATER COMPANY, Appellant,

vs.

THE CITY OF DEFIANCE, AND THE COUNCIL OF THE CITY OF DEFIANCE, Appellees.

Appellees' Reply to Appellants' Supplementary Brief.

The appellees submit that though the judgment of the State circuit court has been reversed by the supreme court of Ohio, no error appears in the record and proceedings of the U. S. circuit court in this case. Ordinarily a judgment can be reversed only where error appears on the record.

It cannot be justly said that the court below erred in giving force and effect to an existing judgment, and in not anticipating and giving effect to a judgment not in existence

when its decision was rendered. The United States circuit court passed on the judgment of the State circuit court, not on the subsequent judgment of reversal by the Ohio supreme court.

When this court has reversed a judgment on which the judgment under review is based, on several occasions, it has reversed the judgment under review or dismissed the appeal or writ of error pending here because of the former judgment of reversal which this court itself had rendered.

Chicago, etc. R. R. Co. v. Fosdick, 106 U. S., 82.
Butler v. Eaton, 141 U. S., 240.
Montana Mining Co. v. St. Louis M. & M. Co., 186 U. S., 24.

When matters affecting the jurisdiction of this court are not shown by the record, and are not within the personal knowledge of the court, under some circumstances, they may be shown by extrinsic evidence, upon proper proceedings being taken.

Dakota County v. Glidden, 113 U. S., 222, **226.**
Kimball v. Kimball, 174 U. S., 158.
Mills v. Green, 159 U. S., 651.

Ordinarily the proceedure is to remand the cause to the trial court with directions to allow the parties to make such showing of extrinsic facts, as they may be advised is necessary, and the court may deem appropriate.

Ballard v. Searls, 130 U. S., 50.
Estho v. Lear, 7 Peters, 130.
Ward v. Joslin, 44 C C A., 456, **463;** 105 Fed., 224, **231.**

In the event of such remand, the costs should abide the final result of the suit.

Wiggins Ferry Co. v. Ohio & Miss. Ry. Co., 142, U. S., 396, **412, 413, & 416.**
Washington Market Co. v. District of Columbia, 137 U. S., 62.
Mills v. Green, 159 U. S., 651.

Especially should this be so when, as in the case at bar, the successful parties have prosecuted their suit by ap-

propriate proceedings, the court has committed no error, and the adjudication under review is on a question anciallary and supplemental to the main issues, and those issues have not yet been determined.

We do not think the judgment, based on an adjudication which has been reversed, should conclude the rights of the appellant though the subsequent reversal is not ground for error before the appellate court.

If this court reaches the conclusion that the United States circuit court properly retained jurisdiction of the cause after the filing of defendants answer, and the judgment of the circuit court dismissing the bill should not be affirmed because the court was without jurisdiction, we are willing, and appellees agree, that this court, by consent of all parties, shall reverse the judgment of the U. S. circuit court as to the former adjudication, and remand this cause to the circuit court for trial on the issues joined by the bill, answer, and replication, and on such other issues as the circuit court may permit to be tendered; or, we agree that this court shall remand the cause to the United States circuit court to have the reversal of the judgment of the State circuit court shown by proper pleadings, and hearing had and adjudication made thereon, and on the other issues joined or hereafter joined in the cause; or, we agree, that such other orders and judgments be made regarding the question of adjudication by the State circuit court and the reversal thereof by the Ohio supreme court, and for the trial of the issues joined by the bill, answer, and replication, or by such other pleadings as the circuit court may permit to be filed, as, in the opinion of this court, may be appropriate in the premises and necessary to protect the rights of both parties.

Ballard v. Searls, 130 U. S., 50.

Farmers and Merchants State Bank v. Armstrong, 146 U. S., 499.

II

The jurisdiction of the United States circuit court was invoked by the appellant, complainant in the lower court, on the ground that on the 7th day of January, 1896, the Council of the City of Defiance, as complainant alleges, passed an *ordinance or resolution* impairing the obligations of the City's contract with complainant's assignor. The alleged impairing ordinance is as follows:

"A Resolution to Draw Warrant in Favor of Water Company for $3,160.00.

Whereas, The Defiance Water Company have submitted a bill to the city council for $3,160 alleged to be due them for said water rental for the past six months, and

Whereas, Said Council are of the opinion that no water contract exists or is between said city and said company for the payment of the same and furthermore that said bill is in view of the deplorable inefficiency of the alleged water service, wholly without merit in reason and equity; and

Whereas, The best interest of the city, in their opinion, demands that the present service be discontinued, and immediate steps be taken for the purpose of supplying water to said City upon fair and equitable terms, therefore

Be it resolved that the City Clerk is hereby directed to forthwith draw his warrant on the City Treasurer against the water fund of said city for the sum of $3160 00 in favor of said Defiance Water Company in full payment of said bill, provided however, that if said warrant be accepted by said company it be taken and accepted by them without thereby in any manner being construed or taken to be any acknowledgement of any contract between them and said city for said water rental, or in any manner implying any actual performance of any alleged contract and that no further payments at the present rate be made to said company."

(Rec. p. 74, Ex. D.)

The allegations of the bill touching these jurisdictional facts are found at the bottom of page 7, et seq., of the record.

Complainant avers in its bill that after the date of this so-called impairment resolution four semi-annual installments of hydrant rental were paid to it by the city, under the contract. (Rec. p. 7.) Defendants, by their answer,

deny that such *ordinance or resolution* was ever passed, or that any claim was ever made by them that the resolution of January 7th, 1896, repealed, annulled, or impaired the contract ordinance, and deny that the city or council ever placed, or do now place any reliance on said resolution further than as a notice to said company that it was not complying with its contract. They aver that the said *ordinance or resolution* was simply a resolution and that, in Ohio, an ordinance cannot be repealed, annulled, or impaired by a resolution; that, if said resolution was ever passed, it had been repealed long prior to the commencement of complainant's suit. (Rec. pp. 65 to 69 inc.)

Our contention is that, on the coming in of this answer and on disclosure of the facts therein set forth, in connection with the facts in complainants bill, the complainants' suit should have been dismissed by the United States circuit court under the rules laid down by this court in—

Robinson vs. Anderson, 121 U. S., 522.

Shreveport vs. Cole, 129 U. S., 36, **44.**

St. Paul Light Co. vs. St. Paul, 181, U. S, 142.

Excelsior Wooden Pipe Co. vs. Pacific Bridge Co., 185 U. S., 282.

This contention is stated on pages 17 and 18 of our supplemental brief submitted on the hearing.

If we are right in this view, the case at bar simply presents a case in which the trial court entered the right judgment, but did not state all the reasons which might have been given therefor, and the judgment of the circuit court dismissing complainants' bill should be affirmed, without prejudice to complainants' right to bring suit, in any court of competent jurisdiction, to recover the amount claimed to be due from the city.

III.

But, if we are wrong in the contention that, on the rec-

ord, the lower court should have determined or that this court should now determine the jurisdictional question, the issues as to whether or not the alleged impairing *ordinance or resolution* was ever passed, or published, whether it was repealed, what its meaning and effect is, are vital and undetermined.

The complainant asks for an accounting and an order that the city pay to it the amount it claims to be due to it from the city under the contract. On the other hand, the city and the council claim that the company has not complied with its contract in any particular. This presents an issue which the defendants are entitled to have tried in this case in which the Water Company seeks to obtain an order for the payment of the money it claims under the contract.

Walla Walla vs. W. W. Water Co., 172, U. S., 1, 23.

The contract ordinance provides: "Sec. 14. Any neglect or refusal on the part of Samuel R. Bullock & Company, their associates, successors, or assigns, after due notice shall have been given them to comply with all the requirements of this ordinance, shall cause a forfeiture of the hydrant rental until each and all of the said requirements herein provided for are complied with." (Rec. p 18)

The city and its council set up in their answer that the Water Company did not comply with the contract in numerous respects, which are specified, and that, though the city notified the Water Company to comply with the said contract, it neglected and refused to do so in every material respect, and that it has not since complied with the contract in any respect, and under the express stipulations and covenants of this section of the contract no hydrant rental is due or payable to the complainant. (Rec. p. 70, et seq.)

These issues and others of equal weight and importance have not been heard or submitted, and on all of them the defendants are entitled to a full hearing. The suggestion that, by reason of their having objected to the complainants offering evidence on the issues joined by the bill, answer and

replication, they should not be allowed a hearing thereon, we apprehend is not placed on sound reasoning, or grounded on fact. The record discloses that, at the time of the trial, the circuit court, sua sponte, announced that the cause was for hearing on the issues presented by the plea of former adjudication, and all remarks touching a hearing on other issues were solely between the complainant and the court, and the record discloses that the defendants did not make objection to hearing the cause on all the issues or offer a single suggestion on the subject. This matter was solely between complainant and the court, (see Rec pp. 98 and 99.) Surely parties should not be deprived of a hearing on and adjudication of important issues because the trial court, on its own volition, directed the order in which issues should be tried.

Respectfully submitted,

HENRY B. HARRIS and
JOHN P. CAMERON,
Solicitors for City Council.
FRED L. HAY and
WILLIAM D. HILL, City Solicitor,
Solicitors for City.